MOTION FILED
NOV 23 2009

No. 09-481 (3)

In The
Supreme Court of the United States

MARTIN PATRICK SHEEHAN, TRUSTEE,

Petitioner,

v.

SCOTT LEMOYNE JACKSON,
THE STATE OF WEST VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE, ROGER SCHLOSSBERG, MORRIS L. HORWITZ, AND JILL L. FORD, EACH CHAPTER 7 PANEL TRUSTEES, INDIVIDUALLY, IN SUPPORT OF THE PETITIONER

Roger Schlossberg
Counsel of Record
SCHLOSSBERG & ASSOCIATES
Post Office Box 4227
Hagerstown, Maryland 21740
(301) 739-8610

Counsel for Amicus Curiae *Dated: November 23, 2009*

THE LEXGROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroup.com

NO. 09-481

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN PATRICK SHEEHAN, TRUSTEE,

Petitioner,

SCOTT LEMOYNE JACKSON,
THE STATE OF WEST VIRGINIA,

Respondents.

Motion to File an Amicus Curiae Brief in Support of the Petitioner

Now comes Roger Schlossberg, Esq., on behalf of Roger Schlossberg, Morris Horwitz, and Jill L. Ford, each of whom are Chapter 7 Panel Trustees and moves this Court to permit the filing of the attached amicus curiae brief in support of Petitioner, Martin P. Sheehan, Esquire, Trustee of the Bankruptcy Estate of Scott Lemoyne Jackson. In support of this motion, the amicus asserts as follows:

1. Each of the Trustees are interested in the outcome of this case because it contains an issue of concern to each of them in their capacity as Chapter 7 Panel Trustees.

List of All Parties to the Proceeding

The parties to this proceeding are all listed in the caption.

The amicus curiae are Roger Schlossberg, Morris L. Horwitz, and Jill L. Ford. Each is a member of a panel of trustees appointed by a United States Trustee pursuant to 28 U.S.C. § 586(a)(1). Mr. Schlossberg is a member of the panel for the United States Bankruptcy Court for the District of Maryland. Mr. Horwitz is a member of the panel for the United States Bankruptcy Court for the Western District of New York. Ms. Ford is a member of the panel for the District of Arizona.

Maryland, New York and California are States, like West Virginia, whose laws provide debtors with exemptions, applicable only in the bankruptcy context and not in proceedings to enforce judgements in state court proceedings. Mr. Schlossberg, Mr. Horwitz, and Mr. Speier are frequently confronted with exemptions under the laws of the State in which they serve as trustees. Ms. Ford has had to confront California exemptions as part of her service as a trustee in Arizona. She objected to the use of a California bankruptcy only exemption scheme that was claimed in Arizona in In re: Regevig, 389 B.R. 736 (Bankr. D. Ariz. 2008). She prevailed on her objection. The California bankruptcy-only scheme was held to have been preempted. This is the opposite conclusion to that reached by the United States Court of Appeals for the Fourth Circuit in the instant case.

Reaching the issues presented by the petition, which asserts such statutes have been preempted, and are otherwise unconstitutional, would assist each of the amici in bankruptcy proceedings in each of their respective jurisdictions.

Table of Contents

Page

Questions Presented i

List of All Parties to the Proceeding ii

Table of Contents iv

Table of Cited Authorities v

Interest of the Amicus Curiae 1

Citation of the Official and Unofficial Opinions and Orders 2

Concise Statement of the Basis for Jurisdiction 3

Constitutional and Statutory Provisions at Issue 3

Article I, Section 8, clause 4 3

Article I, Section 10 4

Article VI 4

11 U.S.C. § 522(a) through (d) 4

W.Va. Code § 38-10-4 15

Statement of the Case 20

Statement of the Facts 20

Summary of the Argument 21

Argument 22

Conclusion 29

Table of Cited Authorities

Page(s)

Cases

BFP v. Resolution Trust Corp.,
511 U.S. 531 (1994) 21, 24, 26, 27

In re: Kanter,
505 F.2d 228 (9th Cir. 1974) 29

In re: Morell,
394 B.R. 405 (Bankr. N.D. W.Va. 2008) 2

In re: Regevig,
389 B.R. 736 (Bankr. D. Ariz. 2008) 1

In re: Scott LeMoyne Jackson,
5:08-bk-00454 (2008) 2

Sheehan v. Peveich,
574 F.3d 248 (4th Cir. 2009) 2, 22, 23-24

Constitutional Provisions

U.S. CONST. art. I, § 8, cl. 4 3

U.S. CONST. art. I, § 10 4

U.S. CONST. art. VI 4

Statutes

11 U.S.C. § 522 .....26, 27

11 U.S.C. § 522(b) 25, 26, 27

11 U.S.C. § 522(b)(1) 22, 24

11 U.S.C. § 522(b)(2) 22, 23, 25

11 U.S.C. § 522(b)(3) 23

11 U.S.C. § 522(d) 22, 24

28 U.S.C. § 586(a)(1) 1

28 U.S.C. § 1254(1) 3

Bankruptcy Act of 1898, 30 Stat. 544 ..... 24, 28

Chandler Act, 52 Stat 840 24

Longshoreman and Harbor Workers' Act of 1927, 44 Stat 1434 28

California Code of Civil Procedure § 703.140(b) 1

Md. Code Ann., Cts. and Jud. Proc. Art., § 11-504 (f) 1

New York Debtor and Creditor § 282 1

W.Va. Code § 38-10-4 ..... 3, 15, 22

Other Authorities

H.R. 95-595 95th Congress, Second Session, *reprinted in* U.S. 29

Sen. R. 95-989, 95th Congress, Second Session, *reprinted in* U.S. 29

U.S. Code Congressional & Administrative News at page 5950 (1978) 29

U.S. Code Congressional & Administrative News
at page 6412 (1978) 29

Collier on Bankruptcy (15th revised edition)
¶ 522.02[4] 22, 23

Interests of the Amicus Curiae[1]

The amicus curiae are Roger Schlossberg, Morris L. Horwitz, and Jill L. Ford. Each is a member of a panel of trustees appointed by a United States Trustee pursuant to 28 U.S.C. § 586(a)(1). Mr. Schlossberg is a member of the panel for the United States Bankruptcy Court for the District of Maryland. Mr. Horwitz is a member of the panel for the United States Bankruptcy Court for the Western District of New York. Ms. Ford is a member of the panel for the District of Arizona.

Maryland, New York and California are States, like West Virginia, whose laws provide to debtors, exemptions, applicable only in the bankruptcy context,[2] and not in proceedings to enforce judgements in state court proceedings. Mr. Schlossberg and Mr. Horwitz are frequently confronted with exemptions under the laws of the State in which they serve as trustees. Ms. Ford has had to confront California exemptions as part of her service as a trustee in Arizona. She objected to the use of a California bankruptcy only exemption scheme that was claimed in Arizona in In re: Regevig, 389 B.R. 736 (Bankr. D. Ariz. 2008). She

---

[1]No party has made a financial contribution to the preparation of this brief other than the named amici. Roger Schlossberg is the sole author of this Brief. A motion for Leave to file the Brief of Amicus Curiae will be filed contemporaneously with the Brief.

[2] Md. Code Ann., Cts. and Jud. Proc. Art., § 11-504 (f); New York Debtor and Creditor § 282; and, California Code of Civil Procedure § 703.140(b)

prevailed on her objection. The California bankruptcy-only scheme was held to have been preempted. This is the opposite conclusion to that reached by the United States Court of Appeals for the Fourth Circuit in the instant case.

Reaching the issues presented by the petition, which asserts such statutes have been preempted, and are otherwise unconstitutional, would assist each of the amici in bankruptcy proceedings in each of their respective jurisdictions.

Citations of the Official and Unofficial Opinions and Orders

The decision of the United States Court of Appeals for the Fourth Circuit in the proceedings below were made as part of a series of consolidated proceedings involving eight specific cases joined under case no. 08-2202(L). The instant case was docketed at the Court of Appeals as case no. 08-2205. The opinion below was published and is reported a Sheehan v. Peveich, 574 F.3d 248 (4th Cir. 2009)

The decision of the United States Bankruptcy Court for the Northern District of West Virginia was made as part of a series of consolidated proceedings in twenty-three cases joined under lead case no. 5:08-bk-00519, In re: Morell. The instant case was individually docketed at case no. 5:08-bk-00454. The opinion of the Bankruptcy Court was published, and is reported as In re: Morrell, 394 B.R. 405 (Bankr. N.D. W.Va. 2008). The opinion in the Morrell case was cited in the order entered in In re: Scott LeMoyne Jackson, 5:08-bk-00454.

Concise Statement of the Basis for Jurisdiction

Judgement was rendered by the United States Court of Appeals for the Fourth Circuit on July 24, 2009. There was no request for a rehearing.

This court has jurisdiction for consideration of a petition for certiorari pursuant to 28 U.S.C. § 1254(1).

The instant case constitutes a challenge to the constitutionality of a state statute, W.Va. Code § 38-10-4. The Attorney General of the State of West Virginia was notified of the challenge to that statute in the Bankruptcy Court. At that time, the Attorney General chose to intervene in the case, and the State of West Virginia is now a party to the proceedings.

Constitutional and Statutory Provisions at Issue

Article I, Section 8, Clause 4

> The Congress shall have Power
>
> . . . .
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Article I, Section 10

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

Article VI

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

11 U.S.C. § 522

> (a) In this section -
>
> > (1) "dependent" includes spouse, whether or not actually dependent; and
> >
> > (2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.
>
> (b) (1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either

paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is -

> (A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or

State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and ;

(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986. If the effect of the

domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:

(A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that -

(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and

(ii) (I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or

(II) the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.

(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(D)(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in

clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.

(ii) A distribution described in this clause is an amount that -

(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and

(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except -

(1) a debt of a kind specified in paragraph (1) or (5) of section 523(a)

(in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5));

(2) a debt secured by a lien that is -

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed;

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution; or

(4) a debt in connection with fraud in the obtaining or providing of any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing

an education at an institution of higher education (as that term is defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)).

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed $15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $2,400 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $400 in value in any particular item or $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $1,500 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $8,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive -

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless –

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to -

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $15,000, on account of personal

> bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
>
> (E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.
>
> (12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A. 414, 457, or 501(a) of the Internal Revenue Code of 1986.

. . . .

W.Va. Code § 38-10-4. Exemptions of property in bankruptcy proceedings.

Pursuant to the provisions of 11 U.S.C. §522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified under the provisions of 11 U.S.C. § 522(d).

Any person who files a petition under the federal bankruptcy law may exempt from property of

the estate in a bankruptcy proceeding the following property:

(a) The debtor's interest, not to exceed twenty-five thousand dollars in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence or in a burial plot for the debtor or a dependent of the debtor: Provided, That when the debtor is a physician licensed to practice medicine in this state under article three or article fourteen, chapter thirty of this code, and has commenced a bankruptcy proceeding in part due to a verdict or judgment entered in a medical professional liability action, if the physician has current medical malpractice insurance in the amount of at least one million dollars for each occurrence, the debtor physician's interest that is exempt under this subsection may exceed twenty-five thousand dollars in value but may not exceed two hundred fifty thousand dollars per household.

(b) The debtor's interest, not to exceed two thousand four hundred dollars in value, in one motor vehicle.

(c) The debtor's interest, not to exceed four hundred dollars in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments that are held primarily for the personal, family or household use of the debtor or a dependent of

the debtor: Provided, That the total amount of personal property exempted under this subsection may not exceed eight thousand dollars.

(d) The debtor's interest, not to exceed one thousand dollars in value, in jewelry held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

(e) The debtor's interest, not to exceed in value eight hundred dollars plus any unused amount of the exemption provided under subsection (a) of this section in any property.

(f) The debtor's interest, not to exceed one thousand five hundred dollars in value, in any implements, professional books or tools of the trade of the debtor or the trade of a dependent of the debtor.

(g) Any unmeasured life insurance contract owned by the debtor, other than a credit life insurance contract.

(h) The debtor's interest, not to exceed in value eight thousand dollars less any amount of property of the estate transferred in the manner specified in 11 U.S.C. § 542(d), in any accrued dividend or interest under, or loan value of, any unmeasured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(i) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(j) The debtor's right to receive:

(1) A social security benefit, unemployment compensation or a local public assistance benefit;

(2) A veterans' benefit;

(3) A disability, illness or unemployment benefit;

(4) Alimony, support or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(5) A payment under a stock bonus, pension, profit sharing, annuity or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, and funds on deposit in an individual retirement account (IRA), including a simplified employee pension (SEP) regardless of the amount of funds, unless:

(A) The plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose;

(B) The payment is on account of age or length of service;

(C) The plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1986; and

(D) With respect to an individual retirement account, including a simplified employee pension, the amount is subject to the excise tax on excess contributions under Section 4973 and/or Section 4979 of the Internal Revenue Code of 1986, or any successor provisions, regardless of whether the tax is paid.

(k) The debtor's right to receive or property that is traceable to:

(1) An award under a crime victim's reparation law;

(2) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(3) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of the individual's death, to the extent reasonably necessary

for the support of the debtor and any dependent of the debtor;

(4) A payment, not to exceed fifteen thousand dollars on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent;

(5) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(6) Payments made to the prepaid tuition trust fund or to the savings plan trust fund, including earnings, in accordance with article thirty, chapter eighteen of this code on behalf of any beneficiary.

Statement of the Case

The Amicus Curiae adopt the Statement of the Case in the Petition for a Writ of Certiorari.

Statement of Facts

The Amicus Curiae adopt the Statement of the Case in the Petition for a Writ of Certiorari.

Summary of the Argument

The opinion below declares Congress authorized States to enact exemption schemes that would only operate in bankruptcy proceedings without any analysis of language of the Bankruptcy Code. It is inconsistent with other opinions, including that of the United States Court of Appeals for the Ninth Circuit, and numerous bankruptcy courts, as the opinion itself recognizes. The result reached is inconsistent with the view of the leading treatise on bankruptcy law.

The portion of bankruptcy law existing in the pre-Code version of bankruptcy law permitting use of non-bankruptcy exemptions is linguistically similar to the language contained in the Bankruptcy Code permitting use of non-bankruptcy exemptions. Inferring a grant of authority to States from such a change in the relevant language is inconsistent with the analysis done in BFP v. Resolution Trust Corp., 511 U.S. 531 (1994), concerning the vitality of pre-Code practices. The result is inconsistent with legislative history prepared in connection with the adoption of the Bankruptcy Code reflecting an intention to eliminate property rights arising from the filing of a bankruptcy petition.

The issue involved has widespread implications and is important to the administration of the Bankruptcy Code.

Argument

A.

Not only is the ruling of the United States Court of Appeals inconsistent with numerous other Court, see Sheehan v. Peveich, 574 F.3d 248, 251 n. 2 (4th Cir. 2009), it is also inconsistent with the leading treatise on bankruptcy law. Collier on Bankruptcy (15th revised edition) ¶ 522.02[4] recognizes that 11 U.S.C. § 522(b)(2) authorizes States to deny debtors access to the exemptions established in § 522(d). To accomplish this objective a State must only prohibit the selection of an exemption under the federal statute. The first sentence of W.Va. Code § 38-10-4 achieves this objective. It reads: "Pursuant to the provisions of 11 U.S.C. § 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified under the provisions of 11 U.S.C. § 522(d)."

The Colliers treatise goes on to observe that;

> In some instances, though, states have gon farther than prohibiting debtors' selection of exemptions under section 522(d). In some states, the property debtors may claim as exempt in bankruptcy proceedings differs from that which they may claim as exempt outside of bankruptcy. . . .
>
> Arguably these provisions are analytically distinct from those statutes that opt out of the federal bankruptcy

> exemption scheme. These provisions operate only in the event of a bankruptcy proceeding. Therefore, exemptions in those states are not even internally uniform and may be susceptible to objection on that ground. Furthermore, these enactments may be vulnerable to attack on the grounds that they are bankruptcy provisions rather than exemption provisions. . . . Section 522(b)(2) does not authorize the states to enact bankruptcy laws.
>
> Once a state has properly opted out of the federal exemption scheme, section 522(b)(3) authorizes the selection of exemptions under other federal law and pursuant to "State or local law that is applicable on the date of the filing of the petition. Since bankruptcy is federal law, a statute that would only operate in a bankruptcy proceeding is arguably not a "State or local law." Therefore, state exemptions that apply only in bankruptcy proceedings should not fall under the authorizing language of section 522(b)(3). These bankruptcy-sparked state exemption provisions have been successfully challenged in several recent cases.

Id. at Collier on Bankruptcy (15th revised edition) ¶ 522.02[4](footnotes omitted).

The decision of the United States Court of Appeals in Sheehan v. Peveich, 574 F.3d 248 (4th Cir.

2009), which Petitioner seeks to have reviewed, declares a different result without any analysis of the statute.

B.

In BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) both the majority and the dissent agreed that, in adopting the Bankruptcy Code, Congress had no obligation to expressly override historical practices. Compare 511 U.S. at 546 with 511 U.S. at 566. The agreement extended to the notion that where repeal by implication had been unambiguously accomplished, then judicial recognition of change was required.

It is plain that some change in exemption law was effected when Congress permitted, under what is now 11 U.S.C. § 522(b)(1), a choice between the exemptions previously available under state law and non-bankruptcy federal law, and the newly created federal scheme of exemption contained in 11 U.S.C. § 522(d). However, the non-bankruptcy law alternative continued the scheme previously contained in Section 6 of the Bankruptcy Act of 1898, as amended.[3] That law provided;

> This Act shall not affect the allowance to bankruptcy of the exemptions which

---

[3] When enacted section 6 of the Bankruptcy Act of 1898, 30 Stat 544 permitted exemption of property exempt from execution and levy at state law. In 1938, the Chandler Act, 52 Stat 840, added exemptions under other federal laws to section 6.

> are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: . . . .

Upon passage in 1978, the Bankruptcy Code provided in section 522(b), as follows:

> Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either
>
> (1) property that is specified under subsection (d) of this section, unless the State Law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
>
> (2) (A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

> (B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

The underlined language of these two statutes reflects little variance in the choice of language between the pre-Code version of the Bankruptcy Act, and the provisions of the Bankruptcy Code. Certainly, there is nothing in these changes which might be said to authorize States to enact State exemption schemes that would only operate in the bankruptcy context.[4] Inferring such a change is inconsistent with the view of both the majority and the dissent in BFP.

With passage of the Bankruptcy Code, Congress permitted a choice between the new federal bankruptcy exemption scheme, and the traditional

---

[4] Section 522 has been amended in several respects since 1978. None of those amendments have caused these central provisions of Section 522 to be eliminated, or significantly changed. Instead, the amendments have a) required joint debtors to use the same exemption scheme, b) have attempted to restrict efforts to manipulate exemptions by moving, and c) have created access to a uniform federal exemption scheme for retirement assets.

non-bankruptcy law exemption scheme. Although Congress permitted States to enact legislation which would bar access to the federal scheme, and to require use of the available non-bankruptcy law alternative, there is no reason to infer Congress intended to permit States to pass bankruptcy only exemption schemes of to supercede the new federal bankruptcy exemption scheme. Such inferences would be inconsistent with the analysis of BFP.

C.

The last minute compromise that led to adoption of section 522 caused there to be virtually no legislative history for the version of this section which became law. Consequently it is difficult to make real inquiry into the intent of Congress on the issue raised by Petitioner. Still, there is insight into a more general approach to how bankruptcy laws should function in some of the legislative history of the Bankruptcy Code.

With respect to a necessary coordinating amendment[5] to the Longshoreman and Harbor Workers' Compensation Act of 1927, 33 U.S.C. § 917, 44 Stat 1434, made in the Bankruptcy Reform Act of 1978, both the Senate Report and the House Report provide:

> Bankruptcy policy strongly favors equality of treatment of all creditors, and **strongly disfavors the creation of property rights upon the filing of a bankruptcy case**. The purpose of bankruptcy is to enforce rights that have arisen before bankruptcy, and to enforce them in an orderly liquidation process. **Springing interests unfairly defeat legitimate expectations** of

---

[5] In Title III of the Bankruptcy Reform Act of 1978 Congress deleted a provision of the Longshoreman and Harbor Workers' Act that had previously provided a springing property right. That provision stated as follows:

> (a) Any person entitled to compensation under the provisions of this chapter shall have a lien against the assets of the carrier or employer for such compensation without limit of amount and shall, upon insolvency, bankruptcy or reorganization in bankruptcy proceedings of the carrier or employer, or both, be entitled to preference and priority in the distribution of the assets of such carrier or employer, or both.

> other creditors who may have relied on the absence of any such prior interests in extending credit. Section 67 of the present Bankruptcy Act and section 545 of proposed title 11 of the United States Code implement this important bankruptcy policy.

(Emphasis added.) Sen. R. 95-989, 95th Congress, Second Session, *reprinted in* U.S. Code Congressional & Administrative News at page 5950 (1978); and H.R. 95-595 95th Congress, Second Session, *reprinted in* U.S. Code Congressional & Administrative News at page 6412 (1978).

Having made an effort to eliminate springing claims, other than the exemption scheme specifically provided by Congress, it seems odd that Congress would somehow have implicitly authorized States to create such rights by passing several bankruptcy only schemes. It seems particularly unlikely since there had been no prior practice of creating bankruptcy only exemptions at State law. The only pre-Code case which attempted to have a bankruptcy only rule had been rejected in In re: Kanter, 505 F.2d 228 (9th Cir. 1974).

Conclusion

WHEREFORE, the undersigned ask that the petition for certiorari to the United States Court of Appeals for the Fourth Circuit be granted because of the division in the Courts below and because of the importance of the issue to the proper administration of bankruptcy law.

Respectfully submitted,

Roger Schlossberg,
Counsel of Record
SCHLOSSBERG & ASSOCIATES
Post Office Box 4227
Hagerstown, Maryland 21740
(301) 739-8610

Counsel for Amicus Curiae
Roger Schlossberg, Morris, L Horwitz, and
Jill L. Ford, each Chapter 7 Panel Trustees